



Additional comments by Senator Sue Boyce and Senator Sarah Hanson-Young

Dismantling the Deficit Model

Introduction

- 1.1 We would like to thank the many people who demonstrated their deep concerns for potential migrants and refugees with a disability, and their families, by making submissions to this Inquiry and appearing as witnesses. As the transcripts and case studies demonstrate many of the stories are harrowing and reveal deep hurt and injustice.
- 1.2 We would like to thank our fellow Committee members and the Committee secretariat for their unfailing sensitivity in dealing with this complex and troubling issue. We acknowledge that the recommendations made in *Enabling Australia: An Inquiry into the Migration Treatment of Disability* would, if accepted by the Government, lead to real and positive changes for people with a disability, and for families that include a person with a disability, wanting to make their homes in Australia.
- 1.3 However, we are of the view that the Inquiry provided sufficient evidence to warrant going further than Recommendation 18 to achieve a truly non-discriminatory, and economically and socially beneficial, approach to migration treatment of disability.

Further recommendations

Recommendation A: We recommend that the Government remove the exemption of the Migration Act 1958 from the Disability Discrimination Act 1992.

Recommendation B: In the event that Recommendation A is not accepted, we recommend that the Government acknowledge that rejecting temporary visa holders as permanent visa holders solely on the basis of the birth of a child with a disability is discriminatory and develop protocols to address this.

Migration Treatment of Disability—History

- 1.4 As outlined in *Enabling Australia*, especially in the discussion preceding Recommendation 4, pp 58, numerous witnesses criticised the confusion within current Australian migration law of disease and disability.
- 1.5 The laws underpinning Australia’s migration treatment of disability and of mental health conditions continue to be based on the outmoded ‘Medical Model’ which views all disability as a deficit requiring cure, not the ‘Social Model’ which acknowledges that social attitudes and the physical environment contribute significantly to the ability of people with a disability or a mental health condition to contribute.
- 1.6 The United Nations Convention on the Rights of People with a Disability, to which Australia was an early signatory, is firmly based in the ‘Social Model’ approach to disability.
- 1.7 The president of the Australian Lawyers for Human Rights, Dr Susan Harris Rimmer, gave the following comparison of the earlier Medical Model of disability and the current Social Model:

The medical model is often called the deficit model. It basically says that a person is defined as not having certain attributes of an able bodied person. So if someone is deaf it means that they do not have the hearing of someone who has 100 per cent hearing. Someone who is blind is opposed to someone who has 20/20 vision. So in some ways it is factual, objective criteria. If someone cannot see that means they are blind. The social model will say: yes, but most of their struggles in life will not come from the fact that they are vision impaired; they will come from the fact that people look at them, see that they are vision impaired and treat them as if they are stupid, for example, or cannot hold down a job or cannot be a father or a mother or –

Senator BOYCE – Or not build buildings that are easy for them to access.

Dr Harris Rimmer – Exactly. Or they will not be able to participate in the workforce because of a range of those impediments caused by people not thinking about blind people when they are designing the building. So, there is this blend of objective criteria that are based on the physical attribute of the person and also the social attitudes that are placed in their road. Some of the obstacles are objective but some are created by society. The social model says that Australia, as far as it can under the disability convention, should try to dismantle as many as it can of those obstacles that are constructed by society – that are not innate. Just because a person is blind, it does not mean that they cannot become a professor of law and head up a UN human rights committee if they are given the right opportunities. Our job is to try to dismantle as many of those socially constructed attitudes and obstacles to full participation as we can. That is what the social model would say. The opposite would be to simply say, ‘You’re blind; therefore you can’t do certain things.’ I do not think the medical model is very good. People would usually call it the deficit model: you are always judged by what you lack, which in this case is sight.

Senator BOYCE – And the current health requirement of our legislation is based on that deficit model?

Dr Harris Rimmer – Yes: ‘You will only ever be a burden economically; we don’t see you in any other term¹

- 1.8 Australian Human Rights Commissioner and Disability Discrimination Commissioner, Mr Graeme Innes AM, described the application of the models to his own disability:

...The initial recommendation in my Public Service career – too many years ago for me to think about now – was that I should not be made a permanent public servant due to my disability. That recommendation was not followed – thankfully, I hope people would feel – and as a result I have managed to make a bit of a career in the Public Service since then.

Senator BOYCE – Mr Innes, I would like your views on the fact that we seem to talk about disability as a disease or condition...

1 Dr Susan Harris Rimmer, Australian Lawyers for Human Rights, *Committee Hansard*, Canberra, 18 November 2010 p. 7.

Mr Innes – I agree with you, and that is the reason that I spoke quite strongly about broadening the criteria so that medical criteria are just a part of the decision-making process. We could characterise disability in a non-medical or non-health way, which would achieve the sorts of objectives that I think you and I would share. The Convention on the Rights of Persons with Disabilities has gone a long way to try to move us away from that medical construct or medical model. I can only adopt the thrust of the convention in that regard, in that it looks at disability as being an impairment whereby the limitations to disability are caused by, in many cases, the barriers which society constructs. To take my disability as an example: I am limited in my enjoyment of movies at the cinema because they are not audio described. A person who is deaf is limited in their enjoyment of movies at the cinema because they are not captioned. So it is not the disability which is the cause of the problem but rather the way that society has constructed itself to only cater to a certain proportion of society – in the same way as, if this building had steps and not a ramp, it would not be catering to all society. So, yes, I think we could better characterise it, and that could be done as part of the drafting for the legitimate, reasonable and objective criteria test that we have talked about.²

Removing the Disability Discrimination ACT 1992 CTH Exemption

- 1.9 Given the damaging and erratic outcomes of attempting to use the existing health-based criteria to assess the economic benefit of an intending migrant with a disability to Australia, especially a child, the Committee sought to discover “on-balance” criteria that would include the social and emotional contributions that a migrant and/or migrant family might make in the future.
- 1.10 Both Mr Innes and Professor Ron McCallum AO, Professor of Labour Law and former Dean of Law in the Faculty of Law of the University of Sydney and current Chair of the United Nations Committee on the Rights of Persons with Disabilities, noted that if they were intending migrants, rather than Australian-born, it is highly probable they would have been refused because of their sight disabilities. (Note: Professor McCallum appeared in a personal capacity.)

2 Mr Graeme Innes AM, Australian Human Rights Commissioner and Disability Discrimination Commissioner, *Committee Hansard*, Sydney, 12 November 2009, p. 7.

- 1.11 The rejection in 2009 of Dr Siyat Hillow Abdi (see Case Study 6.4, *Enabling Australia*), who was the first blind person to be registered as a teacher in South Australia, suggests they are correct in that view.
- 1.12 We contend that these examples alone should be sufficient to cause the Government to rethink the current *Disability Discrimination ACT 1992 CTH* (DDA) exemption applying to migration law.
- 1.13 Whilst numerous witnesses stated it would be possible to identify, adapt or develop actuarial tables to assess the social and emotional benefit, as well as the economic benefit, to Australia of a migrant with a disability, no suitable table was identified by the Committee.
- 1.14 A number of witnesses warned of the shortcomings of existing tables.

Dr Rose—I would just like to pick up on that assessment issue. You are opening up a Pandora's Box. There are a number of assessment instruments that operate within disability specific areas. There are also internationally renowned classifications. One I have already mentioned is the GMFCS, which is the Gross Motor Function Classification System. But if you have an applicant who is deaf then it will not be applicable. So it is a Pandora's Box, and you need to tread very carefully through that minefield in terms of assessment. One strategy could be that if the child is identified as, for example, having cerebral palsy then you could enlist the expertise and experience of the experts that provide services for cerebral palsy to do a further assessment to make sure that it is tailor-made for that particular disability. But then you get into specifics where sometimes the disability is not identified. Sometimes it is a poly-disability and there are elements of autism, Asperger's and something else. It is not specific or there is just a developmental delay. Doctors will not provide a diagnosis, usually, in the first 24 months of a child's life. They are given the diagnosis of developmental delay and not necessarily a label that gets attached to that at such an early age. So be careful with the assessment issue.³

- 1.15 The many witnesses who suggested that the *Disability Discrimination ACT 1992 CTH* (DDA) exemption currently applying to migration be removed, or significantly relaxed, did so on one or more of the five general grounds listed below:
- 1.16 The current exemption meant Australia was contravening its international obligations particularly in regard to the United Nations Convention on the

3 Dr Gabrielle Rose, Cerebral Palsy League, *Committee Hansard*, Brisbane 28 January 2010, p. 22.

Rights of Persons with a Disability (UNCRPD). The Migration Law Program, Australian National University College of Law stated:

To the extent that government uses health criteria to 'pick and choose' those who would be allowed to enter Australia on the basis of the perceived severity of their disability and the perceived health costs flowing from it, such a course of action would be clearly discriminatory and in breach of the freedom of movement guaranteed in article 18 of the Convention.⁴

1.17 The current health-based criteria can put the lives of refugees at risk and/or can place inhumane burdens on families who might be forced to choose between saving most members' lives and leaving a family member with a disability behind.

1.18 The Multicultural Development Association explained:

Most visa assessments are not undertaken at refugee camps but in the closest metropolitan city... What this means is that people are hiding in cities where they may be further discriminated against, or at risk of injury or death because of their ethnicity or disability. ... This is especially dangerous for single women, children, the elderly or those with disability or health conditions that are vulnerable targets.⁵

1.19 Dr Susan Harris Rimmer, Australian Lawyers for Human Rights, said:

If you are making someone choose between saving their life and staying with their child, often the family will make the decision that the mother will stay because the mother is not the target of the persecution but the father is, and the father will leave. Australia is one of the few countries that forces people to take that sword of Damocles sort of decision.⁶

1.20 The requirement that Medical Officer of the Commonwealth (MOC) assess costs based on migrants with a disability using all available health and community services in Australia ignores the emotional, and subsequently financial, costs associated with splitting families; ignores cultural attitudes to family obligations and caring; and ignores the financial resources of some families.

4 Migration Law Program, Australian National University, College of Law, *Submission 59*, p. 5.

5 The Multicultural Development Association, *Submission 20*, p. 4.

6 Dr Susan Harris Rimmer, Australian Lawyers for Human Rights, *Committee Hansard*, Canberra 18 November 2009 p. 12.

1.21 Ms Benson from the Multicultural Development Association said:

I think settlement would be less resource intensive if people were able to reunify with their families.⁷

1.22 The Public Interest Advocacy Centre and NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors stated:

In many cases, the MOC cost assessment is based on the assumption that an applicant with a disease or condition would access all available health and community services. This assumption however ignores the fact that in many cases strong family and cultural ties mean that applicants with a disease or condition would be more likely to be cared for by a family member and less likely to be put into care.⁸

1.23 In the case of the 'one fails, all fail' rule, Australia is depriving itself of untold talent and significant economic contributions. See Case Study 6.3, Case Study 5, and Case Study 6, *Enabling Australia*, as examples.

1.24 It is impossible to assess, or currently even place a value on, some of the contributions that a person with a disability, given a supportive environment, might make to Australia. *Enabling Australia* contains numerous case studies of adults with a disability whose abilities were underestimated or improved and have subsequently made significant contributions. See Case Study 6.4

1.25 This view was shared by the specialist medical organisation, the Royal Australasian College of Physicians, which stated:

The Royal Australasian College of Physicians (RACP) believes that people with disabilities may be rejected because of untested assumptions about future costs associated with their disability. It is difficult to rationally and fairly assess the costs associated with disability or illness over a person's life time, and arguably there is significant room for interpretation in this process.⁹

1.26 This is even more so in the case of children with a disability. Whilst we do not believe the system should laud 'super migrants' over 'ordinary migrants', there are numerous examples in *Enabling Australia* of children who have grown up to make outstanding economic and/or social contributions to their communities. See the accounts of Ms Sharon Ford's

7 Ms Kerrin Benson, Multicultural Development Association, *Committee Hansard*, Brisbane, 28 January 2010, p. 36.

8 The Public Interest Advocacy Centre and NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, *Submission 87*, p. 10.

9 The Royal Australasian College of Physicians, *Submission 80*, p. 9.

daughter with Down syndrome (see Case Study 6.3) and of Mr Abebe Fekadu, who is a paraplegic, in *Enabling Australia*, p 49.

1.27 Ms Maureen Fordyce, from AMAPRO Advocacy Inc stated:

It is ludicrous that the current system tries to predict. With one individual, a young child, they predicted he would never be able to walk or talk or do many of the things that he is currently doing, like running and speaking. The idea that you can look at a young child and try to predict how they will develop based on the medical model is completely flawed and needs to change.¹⁰

1.28 Opposition to, or concern about, completely removing the exemption of migration law from the provisions of the DDA was most often based around the Public Interest Criteria (PICs), which address the possibility of 'undue cost to the Australian community' and 'undue prejudice to the access to health care or community services of an Australian citizen or permanent resident'. See Migration Regulations 1994 summary, *Enabling Australia*, pp. 11-12.

1.29 However a number of witnesses queried the motivation of this opposition. Ms Karen Lloyd, the executive officer of Deaf Australia Inc. commented:

I would like to ask the question about the whole thing – about the Migration Act and the assessment of those people with disabilities and with ill health: what are we trying to protect Australia from? Are we trying to protect Australia from illnesses that are contagious, like they do at Customs, where you cannot bring in fruit or wood that carries disease? Are we trying to do that with people or are we trying to protect Australia from the fact that if we do not understand it, we do not like it? I think that is a question that needs to be addressed.¹¹

1.30 It seems to us that concerns about cost, about depriving Australians of access to services and about excessive litigation are versions of the view that removing the exemption would open the floodgates to migrants with a disability.

1.31 One witness, Dr Gabrielle Rose, of the Cerebral Palsy League, described this view as: 'the flavour of this discussion: the unspoken thing'.¹²

1.32 In regards to the likelihood of increased litigation, Professor Mary Crock, an immigration law expert, commented:

10 Ms Maureen Fordyce, AMPARO Advocacy Inc, *Committee Hansard*, Brisbane 28 January 2010, p. 22.

11 Ms Karen Lloyd, Deaf Australia Inc, *Committee Hansard*, Brisbane 28 January 2010, p. 22.

12 Dr Gabrielle Rose, Cerebral Palsy League, *Committee Hansard*, Brisbane 28 January 2010, p. 24.

The idea that you can actually use regulations to get lawyers out of the migration business has always been a total mystery to me. That is what we do. You cannot regulate people out. I have for many years tried to say, 'Just stop with the legislation already if you want to get the lawyers out.' There will be litigation. Whenever there is a rule change, people litigate to see what the boundaries of the rules are. It is inevitable. There is litigation at the moment that goes on in this area. It is not entirely settled. So I do not think that it is going to open the floodgates to litigation. It is, on the other hand, going to take a lot of pressure off the minister. That is what it is going to do and it is better to have litigation where you can actually see how the rules are operating and it is transparent than to have everything happening behind a closed door. I have been saying for years that I think it is totally offensive that I have to have a relationship with Minister X or Minister Y in order to get a result for a client. That is just wrong. You should have a system that operates with transparency and if it means that a few people go to a tribunal or to a court then so be it. That is much better than going through the senators' entrance at Parliament House.¹³

- 1.33 In any case, her husband, Professor McCallum, who was instrumental in the development of the United Nations Convention on the Rights of Person with Disabilities, operational in Australia from 2008, stated:

I have no doubt that if our migration rules remain as they are someone will bring a complaint under the optional protocol to the (UN) committee on which I sit. I can say this because I would, quite properly, be debarred from sitting on any complaint that came from Australia. I have seen instances, particularly, of families with disabled members who feel hurt and undone by the rigidity of these non-balancing rules. One of the reasons that we have a convention is to try to change some of these stereotypes. These rules are contrary to the social model in their stereotypical, non-balancing operation.¹⁴

- 1.34 The National People with Disabilities Carer Council strongly argued that the Migration Act should not be exempted from disability discrimination law.
- 1.35 Asked about the potential for this to worsen existing unmet need for Australians with disability, the Council's chairperson, Dr Rhonda Galbally, said:

13 Professor Mary Crock, *Committee Hansard*, Sydney, 12 November 2009, p. 21.

14 Professor Ron McCallum AO *Committee Hansard*, Sydney, 12 November 2009, p. 22.

I regard that as a furphy that has been raised in the immigration debates in general – that is, you should not have immigration to Australia because it might affect the working conditions of the current inhabitants. The issues to do with the unmet need of people with disability are being addressed. I think that the government has made a major stand already by commissioning the Productivity Commission analysis of the feasibility of other models for dealing with this in Australia so that we will have sustainable options. The new National Disability Strategy under development is also tackling these issues. The numbers of immigrant people with disabilities that we are speaking about would really be very irrelevant to the massive issue of unmet need that I agree with you does have to be addressed.¹⁵

- 1.36 Dr Galbally also stated to any irrational fear that removing migration discrimination against people with disabilities would not, open the floodgates.

Dr Galbally – We have gradually seen a change over time where the interpretations of the law have changed over the last two decades. We have never seen a flood to Australia. We have seen genuine families applying to come here or people in refugee situations where they happen to have a family member with a disability who they declare, and there will be families who do not declare them as things have become harsher and harsher. So I think that it is like the mythology of the yellow hordes flooding down from China argument.

Dr Galbally – It is fear mongering, is my view, like another form of racism. I think it is very dangerous, those sorts of arguments. The data, from my understanding of it, would indicate that there has never been a time in Australian history when families with people with disabilities have flooded into this country. We have had in the past a more liberal interpretation of the position compared with the position we have currently. I just cannot see it as a possibility.¹⁶

- 1.37 Other witnesses noted that Australia was just one player in the highly competitive international market for skilled labour and being seen as a disability-friendly nation would assist Australia in attracting individuals

15 Dr Rhonda Galbally, National People with Disabilities Carer Council, *Committee Hansard*, Melbourne, 18 February 2010 p .2.

16 Dr Rhonda Galbally, National People with Disabilities Carer Council, *Committee Hansard*, Melbourne, 18 February 2010 p .6.

and families with valuable skills. Mr Andrew Bartlett, from the Ethnic Communities Council of Queensland, said:

... it is a simple fact that with regard to the developed world longer term, in certain areas of skills there will be a lot of competition globally. I do not think that is going to change. Like a lot of areas, it serves us well – whether it is on a purely economic competitive basis or on some of those looser general terms of being seen to be more engaging, welcoming and encouraging of diversity – to have more recognition of the wider contributions people make. It gives us extra advantages over countries that do not do that ¹⁷

1.38 We also note the comments of the Committee Chair, Mr Michael Danby, to witnesses at the Committee's Brisbane hearing:

I notice in your submission... there is a general discussion on the economic and social benefits to Australia of immigration. This is not strictly to do with disability, but I want you to know that we had before this committee some evidence from Access Economics. If you extrapolate that economic modelling to the current level of migration, broken up by category you will find that after the first year even the humanitarian program has a net positive benefit on the tax base. That is unchallenged. I recently had an article published in the Age to that effect, and it was massively attacked by Hansonites and Greens et cetera. But no-one disputed the modelling; no-one was able to cast doubt on it at all. So if you want to look at the net economic benefit of even the humanitarian program of current migration over the next 20 years you can find it on my website. ¹⁸

1.39 In our view, if such a disadvantaged group as those who come to Australia under the humanitarian program make a positive economic contribution after only 12 months, it is just as likely that individuals with a disability, who themselves meet all other relevant criteria or whose family members do, would similarly make a quick and positive contribution.

1.40 Given the weight of testimony to this Inquiry suggesting low costs and high benefits to Australia, we urge the Government to accept our Recommendation A and remove the exemption of the Migration Act 1958 from the Disability Discrimination Act 1992.

17 Mr Andrew Bartlett, Ethnic Communities Council of Queensland, *Committee Hansard*, Brisbane, 28 January 2010, p. 5.

18 Mr Michael Danby MP, Chair, Joint Standing Committee on Migration, *Committee Hansard*, Brisbane, 28 January 2010, p. 29.

‘A Special Case?’—Children with disability born in Australia to temporary visa holders

- 1.41 There are a small number of cases each year of couples in Australia holding temporary visas conceiving and giving birth to a child with a disability and subsequently being refused permanent visas, or being advised not to apply for permanent visas, on this ground alone. See example in AMPARO Advocacy Inc, Submission 40, p. 4.
- 1.42 Mr Graeme Innes said these cases had not been brought to the attention of the Human Rights Commission and the Commission did not have an opinion on them, but conceded that he could certainly ‘see the argument’¹⁹ for this to be treated as overt discrimination.
- 1.43 In the same context, Professor Mary Crock told the Committee:

Disability happens. It is just part of life, and it reduces us as a country enormously if we are not able to deal with that in a humane fashion. If we are going to regard ourselves as a compassionate country, that believes in human rights, then surely you have to start with the child that is born with a disability on our shores. A child should not be condemned to death or to serious discrimination if they have been born in Australia – if that is going to be the consequence of sending them back.²⁰

- 1.44 Given the strength of the grapevine within the disability sector, Mr Andrew Bartlett’s comments regarding signals sent to all individuals and families in Australia are particularly apposite.

(The) wider issue of the signals that are sent when a family is knocked back because they have a child with a particular disability or a health condition is one that should not be ignored. The cost might be able to be quantified in dollars and cents in the way we can regarding health treatment but if we have families knocked back, as we have seen in some of the more high profile cases such as ... Dr Moeller with a child with Down syndrome, and the example from the previous government ... that got a lot of profile regarding a child who had autism. It is not just trauma for that family, it is not just an impediment to their ability to settle more steadily, it is not just an extra unnecessary burden with excessive activity in the migration process or the administration of it, it also sends a signal to every single family around Australia who may

19 Mr Graeme Innes, Human Rights Commission, *Committee Hansard*, Sydney, 12 November 2009 p. 9.

20 Professor Mary Crock, *Committee Hansard*, Sydney, 12 November 2009, p. 20

have a member with autism or Down syndrome that somehow or other they are a drain on society. We really need to emphasise, whether it is through our multicultural framework or our disability policy framework, that everybody has the capacity to contribute positively to the community and we should be looking at every opportunity to strengthen that signal.²¹

- 1.45 We would urge the Government to accept our **Recommendation A**. But, in the event, that the Government rejects this suggestion, we believe that **Recommendation B** should be favourably considered along with the 18 recommendations in *Enabling Australia*.

Senator Sue Boyce
June 2010

Senator Sarah Hanson-Young
June 2010

21 Mr Andrew Bartlett, Ethnic Communities Council of Queensland, *Committee Hansard*, Brisbane, 28 January 2010, p. 3

